

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA No. 922/2017**

% **26th September, 2018**

SURESH KUMAR Appellant

Through: Mr. Tanvir Khan, Advocate
(9810755422) & Mr. Intikhab
Alam, Advocate.

versus

KISHAN GUPTA Respondent

Through: Mr. Darshan Paliwal, Advocate
(9953288797) & Mr. R.K.Pillai,
Advocate (8700485107)

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant in the suit impugning the Judgment of the Trial Court dated 27.07.2017 by which the trial court has decreed the suit for possession and *mesne* profits filed by the respondent/plaintiff.

2. The facts of the case are that the respondent/plaintiff pleaded that he purchased the suit property from Sh. Yad Ram in terms of a registered Agreement to Sell and Purchase dated 16.04.2009. Respondent/Plaintiff paid a sum of Rs.2,15,000/- in cash to the seller Sh. Yad Ram. The suit property is the DDA Flat bearing No.A-73-A, Ground Floor, Janta Flat, Raghubir Nagar, New Delhi. The respondent/plaintiff pleaded that on the date of entering into the registered Agreement to Sell dated 16.04.2009 with the seller Sh. Yad Ram, the appellant/defendant was in illegal possession of the suit property, as the permissive licence granted by Sh. Yad Ram to the appellant/defendant to stay in the suit property already stood withdrawn by Sh. Yad Ram. Since the appellant/defendant failed to vacate the suit property, hence the respondent/plaintiff after serving the Legal Notice dated 19.03.2011, filed the subject suit for possession and *mesne* profits.

3. The appellant/defendant contested the suit and pleaded that he was in fact a tenant in the property inducted by the original owner Sh. Yad Ram. It was pleaded by the appellant/defendant that Sh. Yad Ram had first entered into an agreement with him on

01.05.2004 whereby Sh. Yad Ram had received a sum of Rs. 3 lacs from the appellant/defendant so that the appellant/defendant could stay in the suit property without paying any rent. It was then further pleaded by the appellant/defendant that on 17.03.2009, Sh. Yad Ram contacted the appellant/defendant alongwith the respondent/plaintiff and one Mr. Mukesh Sharma and at that time Sh. Yad Ram agreed to transfer the ownership rights of the suit property in favour of the appellant/defendant for a total sale consideration of Rs.5,30,000/-, and therefore an Agreement to Sell was executed in favour of the appellant/defendant on 27.03.2009. It was also pleaded that as per the Agreement to Sell dated 27.03.2009 a sum of Rs.50,000/- was paid by the appellant/defendant to Sh. Yad Ram, and the balance sale consideration of Rs.4,80,000/- was given with the amount of Rs.50,000/- being paid in cash and the sum of Rs.4,80,000/- being paid by bank draft. It was pleaded that however, Sh. Yad Ram failed to reach the office of the Sub-Registrar on 20.04.2009, where the respondent/plaintiff was present as a Mediator. Accordingly, the suit was prayed to be dismissed.

4. After pleadings were complete, trial court framed the issues and parties led evidence. These aspects are recorded in paras 7 to 14 of the impugned judgment and these paras read as under:-

“Issues

7. After completion of the pleadings and from material on record, following issues were framed by my Ld. predecessor on 08.01.2013 :-

Issue no. 1: Whether the suit is bad for non-joinder of the necessary parties, as prayed in preliminary objection no. 3. If so, its effect? OPD

Issue no. 2: Whether the suit has not been valued properly for the purposes of court fees and jurisdiction? OPD

Issue no. 3: Whether the plaintiff is entitled for recovery of possession of the suit property being the owner of the same? OPP

Issue no. 4: Whether the plaintiff is entitled to the decree of *mesne* profit at the rate of Rs. 4,000/- per month from the date of filing of the present suit? OPP

Issue no. 5: Whether the plaintiff is entitled for interest @18% per annum from the date of filing of present suit till the date of vacant and peaceful possession of the suit property? OPP

Issue no. 6: Whether the plaintiff is entitled for decree of permanent injunction as prayed for? OPP

Issue no. 7: Relief.

Plaintiff's Evidence

8. In order to prove his case, plaintiff has examined himself as PW-1 and filed his evidence by way of affidavit Ex. PW1/A wherein he reiterated the contents of the plaint on oath. PW-1 has relied upon the certain documents i.e site plan as Ex.PW1/1, registered agreement to sell and purchase dated 16.04.2009 as Ex.PW1/2, registered GPA dated 16.04.2009 as Ex.PW1/3, original receipt, will, affidavit as Ex.PW1/4 to Ex.PW1/6 respectively, copy of letter dated 28.05.1997 as Ex.PW1/7, original copy of the letter dated 16.05.1997 as Ex.PW1/8, original receipt

no. 7839 as Ex.PW1/9, original receipt dated 14.01.1998 as Ex.PW1/10, original letter dated 13.06.1997 as Ex.PW1/11, copy of the legal notice with postal receipts and courier receipts and returned envelope as Ex.PW1/12 (collectively) and postal receipts and returned envelope as Ex.PW1/13 (collectively). PW-1 was cross-examined on behalf of the defendant and then discharged.

9. Plaintiff examined Sh. Deshbandhu Gosain, UDC from the office of Sub Registrar II as PW-2. He has proved the agreement to sell and purchase dated 20.04.2009 which was already Ex.PW1/2. He was cross examined by defendant and then discharged.

10. Plaintiff examined Sh. Diwan Singh , LDC from the office of DUSIB as PW-3. He has proved the allotment letter of the suit property in the name of Sh. Yad Ram s/o Sh. Budha which was already Ex. PW1/7. He was also cross-examined by counsel for the defendant and then discharged.

11. Plaintiff also examined Sh. Jagbir Singh as PW-4 and Sh.Chotey Lal Chaudhary as PW-5. Both these witnesses have filed their affidavit in examination in chief i.e Ex. PW4/A and Ex. PW5/A.

12. PW-4 has deposed in the examination in chief that the plaintiff is owner of the suit property and he purchased the same from Sh. Yad Ram vide agreement to sell and purchase dated 20.04.2009. Defendant is residing in the suit property. Sh. Chotey Lal Chaudhary prepared the demand draft for sum of Rs. 4,30,000/- on 14.04.2009 in favour of Sh. Yad Ram at the instance of the plaintiff as said Sh. Yad Ram refused to accept the payment in cash. Documents with respect to the transfer of property were executed by Sh. Yad Ram in favour of the plaintiff. It is further deposed that defendant refused to vacate the suit property despite repeated requests of the plaintiff. PW-5 has also deposed on the lines of PW-4. Both witnesses were cross-examined on behalf of defendant and then discharged. No other witness was examined by plaintiff. Hence, PE was closed.

Defendants' Evidence

13. Defendant has examined Sh. Dharampal as DW-1 and Sh. Tilak Raj as DW-2. Both these witnesses filed their evidence by way of affidavit as Ex.DW1/A and Ex.DW2/A wherein they have reiterated the contents of the written statement on oath. Both the witnesses were cross-examined on behalf of plaintiff and then discharged.

14. Defendant examined himself as DW-3. He filed his evidence by way of affidavit as Ex.DW3/A wherein he has reiterated the contents of the written statement on oath. DW-3 has relied upon certain documents i.e

copy of the agreement to sell and purchase dated 27.03.2009 as Ex.DW3/1, copy of agreement of settlement dated 20.04.2009 as Ex. DW3/2 , copy of affidavits of Yad Ram, Devender and Hemant all dated 20.04.2009 as Ex. DW3/3, Ex. DW3/4 and Ex. DW3/5. DW-1 has also relied upon the copy of voter I card of himself and his wife as Ex.DW3/6 and Ex.DW3/7. DW-1 has identified the postal receipts with respect to the complaint dated 05.12.2011 made by DW-1 against the plaintiff as Ex.DW3/8. DW-3 was cross-examined on behalf of the plaintiff and then discharged. No other witness was examined by defendant. Hence, DE was closed.”

5. The only issue to be examined by this Court is as to whether there existed a valid Agreement To Sell in favour of the appellant/defendant dated 27.03.2009 thereby creating rights in the suit property in favour of appellant/defendant or that the original owner Sh. Yad Ram instead had validly transferred rights in the suit property to the respondent/plaintiff in terms of the registered Agreement to Sell dated 20.04.2009.

6. In this regard firstly it is noted that the appellant/defendant though has relied upon an Agreement to Sell dated 27.03.2009 in his favour, however, in the record of the trial court only one page i.e. the first page only of this alleged Agreement to Sell dated 27.03.2009 has been filed. This first page of the alleged Agreement to Sell only details the parties to the document and the sale consideration and nothing else. In other words, the so called Agreement to Sell in favour of the appellant/defendant is not a

complete Agreement to Sell which is filed, but only the first page of the Agreement to Sell is filed, and this page has been exhibited as Ex.DW3/1. In this first page, it is stated that the Agreement to Sell is for a total sale consideration of Rs.5,30,000/-, and of this total amount, a sum of Rs.50,000/- was paid in cash. Therefore, in my opinion, on the basis of this one page, being just the first page of an Agreement to Sell, with all other pages missing, it cannot be held that there existed a valid Agreement to Sell dated 27.03.2009 in favour of the appellant/defendant.

7. Even assuming that there existed a complete Agreement to Sell dated 27.03.2009 in favour of the appellant/defendant, even then such an Agreement to Sell on account of not being registered, could not be looked into for giving to the appellant/defendant, the benefit of the doctrine of part performance contained in Section 53A of the Transfer of Property Act, 1882. This Section 53A was amended on 24.09.2001, whereby no agreement to sell in the nature of part performance can be looked into by the Court unless the agreement to sell is stamped on ad valorem court fee for 90% of the sale consideration and the agreement to sell is also registered. Therefore,

besides the fact that there is no Agreement To Sell and only the first page of the Agreement to Sell dated 27.03.2009 has been proved as Ex.DW3/1, even assuming such an Agreement to Sell existed, the same yet had no legal sanctity and would not operate in favour of the appellant/defendant.

8. Another aspect to be noted is that the appellant/defendant claims to have paid the entire amount of Rs.5,30,000/- to the seller Sh. Yad Ram pursuant to the Agreement to Sell dated 27.03.2009 but there is no proof as to the factum of payment of this sale consideration of Rs.5,30,000/- by the appellant/defendant to Sh. Yad Ram. No documentary evidence whatsoever has been filed of making any payment by any banking instrument by the appellant/defendant to the seller Sh. Yad Ram of the amount of Rs.4,80,000/-, and i.e. even if we accept that Rs.50,000/- was paid in cash as per the alleged first page of the Agreement to Sell dated 27.03.2009.

9. It is also required to be noted that the appellant/defendant has not brought into the witness box Sh. Yad Ram to show that how and if at all the appellant/defendant had paid a sum of Rs.5,30,000/- to Sh. Yad Ram for purchasing rights in the suit property, and which is

the subject matter of the alleged one page Agreement to Sell/ Ex.DW3/1.

10. It is therefore held that there is no Agreement to Sell dated 27.03.2009 in favour of the appellant/defendant, with the fact that no evidence is led by the appellant/defendant to prove that he had paid a sum of Rs.5,30,000/- to Sh. Yad Ram.

11. In my opinion, a very important aspect to hold the respondent/plaintiff to have become the owner of the suit property, and not the appellant/defendant, is because the suit property was allotted to Sh. Yad Ram by the Slum and J.J. Department, MCD and the entire set of original documents of the possession slip and the allotment letter to Sh. Yad Ram from DDA have been filed and proved by the respondent/plaintiff as Ex.PW1/7(colly) in the trial court. Not only the title documents of the suit property are in possession of the respondent/plaintiff but all other original documents of the suit property pertaining to the electricity connection or payment of amount to MCD etc are in possession of the respondent/plaintiff and the same were filed and proved in the trial court record as Ex.PW1/8 to Ex.PW1/11. In my opinion, therefore, once the entire

original documents of the suit property are with the respondent/plaintiff, obviously this would be so because the respondent/plaintiff had become the owner of the suit property having purchased rights in the same from Sh. Yad Ram in terms of the registered Agreement to Sell dated 16.04.2009/Ex.PW1/2.

12. No other issue or argument is urged before this Court except as discussed above.

13. In view of the aforesaid discussion, I do not find any merit in the appeal. Trial court has rightly decreed the suit for possession and *mesne* profits filed by the respondent/plaintiff. Dismissed.

SEPTEMBER 26, 2018/ib

VALMIKI J. MEHTA, J